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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

MISSOURI PACIFIC RAILROAD COMPANY, a Corporation,

Petitioner,

vs.

HARTLEY BROTHERS, a Co-partnership composed of F. M. Hartley and T. H. Hartley,

Respondents.

NO. 200.

BRIEF FOR RESPONDENTS.

CONCISE STATEMENT OF CASE.

The Supreme Court of Oklahoma, the court of last resort in said state, having affirmed the judgment of the district court of Rogers County, Oklahoma, in an opinion delivered December 20, 1932 (Tr. 156-158), 162 Okla. 194, 19 Pac. (2d) 337, and this Court having granted a writ of certiorari (Tr. 167) upon petition of the railroad company, on October 9, 1933, and the petitioner having filed a brief herein, it becomes our duty to file a brief on behalf of respondents.

We do not feel that the portion of the "Concise Statement of Case" on page 2 of petitioner's brief correctly

gives the import of the respondents' petition filed in the district court of Rogers County, Oklahoma. That portion of said statement implying that we alleged a certain number of our cattle came into petitioner's possession is correct. We followed this allegation with an allegation of the infliction by petitioner of certain injuries upon these cattle and the manner in which this was done, as is shown by the following quotation of that portion of our petition (Tr. 4):

"That the defendant railroad corporation was negligent and careless in the transportation of said cattle in that the train on which they were transported was jerked about and shunted to and fro in such a manner that the cattle were thrown from their feet onto the floors of the cars and were trampled upon by other cattle, and by reason of such rough handling and carelessness and negligence on the part of the said railroad corporation in transporting said cattle, the said cattle were bruised, skinned, maimed, lamed, and their bones broken and at the time said cattle were delivered to these plaintiffs at Delaware, Oklahoma, and unloaded from said cars, 42 head of said cattle were dead and more than 50 head of said cattle were in such physical condition (fols. 31 and 32) that these plaintiffs were required to haul said cattle from said railroad cars to these plaintiffs' ranch and thereafter 50 head of said cattle died as a result of the injuries received while being transported by said railroad corporation as aforesaid. That the injuries to and death of said cattle were the direct and approximate result of the rough, negligent and careless manner in which said cattle were transported by said Missouri-Pacific Railroad Company, and not as a result of any act on the part of these plaintiffs."

We pleaded the total number of our injured cattle at the time of delivery at Delaware, Oklahoma, as being 92.

We did not plead a series of periods at which there were different numbers affected by different injuries from different causes, as is implied in petitioner's statement.

We especially disclaim any effort to recover for any cattle, if any, lost by dipping, disease, inherent weakness, or any other cause than "carelessness and negligence of the petitioner in the transportation of said cattle while they were actually in transit."

We direct attention to the testimony of Dow Rana (Tr. 10-11-12) as to the number of cattle dead when unloaded at Little Rock, Arkansas, at the completion of a journey from Malvern, Arkansas, a distance of only 40 miles, and whose appearance on arrival at destination was that of cattle "badly bruised and tramped." We direct attention to the testimony of Dow Rana (Tr. 15-18) for the details of the journey from Little Rock, Arkansas, to Delaware, Oklahoma, with a short stop-over at Van Buren, Arkansas, in which is affirmatively established the carelessness and negligence of the petitioner in the handling of said cattle in transit. We direct attention to the testimony of Dow Rana (Tr. 20) and of T. H. Hartley, one of the respondents (Tr. 41-44), as to the condition of the cattle at the time they were unloaded at Delaware, Oklahoma. We direct attention to the testimony of the witness Dow Rana (Tr. 20) and of T. H. Hartley (Tr. 41-44) as to the number of dead at the time they were unloaded at

Delaware, Oklahoma; and the testimony of T. H. Hartley (Tr. 42-44) and the witness Fred Sharp (Tr. 67-68), to whose pasture the cattle were removed, as to the numbers which died immediately after removal from the train and pens to the pasture. We direct attention to the testimony of the witness T. H. Hartley (Tr. 44) as to the value of the cattle which died as the result of such injuries.

We say that all of this is ample to support the verdict of the jury in this case for $1750.00.

JURISDICTION.

This was a shipment of livestock between a point in the State of Arkansas and a point in the State of Oklahoma, and in our judgment constitutes interstate commerce. It was made under the terms and provisions of a uniform livestock contract prescribed by the Interstate Commerce Commission and adopted March 15, 1922. We, therefore, believe this Court has jurisdiction to review a judgment of the Supreme Court of the State of Oklahoma, involving a construction of this contract adopted under authority of an Act of Congress.

BRIEF AND ARGUMENT.

It is the contention of the respondents that the rule of law announced by this Honorable Court in the cases of *Barrett* v. *Van Pelt*, 268 U. S. 85, 45 S. Ct. 437, 69 L. Ed.

857; *Davis* v. *Roper*, 269 U. S. 158, 46 S. Ct. 28, 70 L. Ed 209, 44 A. L. R. 1357; *C. & O. Ry. Co.* v. *Thompson*, 270 U. S. 416, 46 S. Ct. 318, 70 L. Ed. 659, is controlling. These cases involved a construction of a proviso in Ch. 176, sec. 1, 33 Stat. at L. 1196-1199 (49 U. S. C. A. 20 (11)), reading as follows:

> "* * * Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice; Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

This proviso in this statute, in effect, is found in the uniform livestock contract, sec. 2, par. c (Tr. 88), under which the cattle in question were shipped.

The petitioner relied upon the notice provided for by sec. 4, par. c (Tr. 89) of said uniform livestock contract, which reads:

> "Before the livestock is removed from the possession of the carrier or mingled with other livestock the shipper, owner, consignee or agent thereof shall inform in (fol. 214) writing the delivering carrier of any visible or manifest injury to the livestock.".

and the alleged failure of respondents to give such notice, as a defense. (Second paragraph of answer to amended petition, Tr. 5-6.) The petitioner requested an instruction to the jury upon this point and this requested instruction was given (Tr. 146-7). The petitioner is consistent by insisting in its brief that said sec. 4, par. c, of said uniform livestock contract is to be given an equal, if not a controlling, contemporaneous construction with the above quoted sec. 2, par. c, as construed by this Court in the cases above cited.

We are unable to find a decision by this Court construing the effect of both of these conditions in a uniform shippers' contract.

The first authority for the Interstate Commerce Commission to prescribe a uniform shipper's contract must be found in Ch. 104, sec. 20, 24 Stat. at L. 379-386, an Act of Congress of February 4, 1887, wherein it is said:

> "• • • Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements or contracts with other common carriers, as the commission may require;"

and as amended by an Act of Congress of June 29, 1906, Ch. 3591, sec. 7, 34 Stat. at L. 584-595, wherein it is said:

> "• • • That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in

another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; * * *."

We have found a number of cases, among them *Northern P. Ry. Co.* v. *Wall,* 241 U. S. 87, 60 L. Ed. 905, 36 Sup. Ct. Rep. 493 (arose in 1912 and decided in 1916), in which the uniform shipper's contract then in use made the notice relied upon by the petitioner a condition precedent to the right of recovery. Whether this was a proper exercise of the Interstate Commerce Commission's authority to prescribe uniform contracts or not, the Congress of the United States saw fit to limit the authority of the Interstate Commerce Commission in this respect and to limit the conditions which the carriers might insert in the shipping contracts relating to notice of injuries or claims. This was done by the Act of March 4, 1915, Ch. 176, sec. 1, 38 Stat. at L. 1196, 49 U. S. C. A. 20 (11) supra. Since then the Interstate Commerce Commission has not had authority to prescribe, nor the carriers the right to include, provisions in a shipping contract requiring any notice or claim as a condition precedent to the right to recover for the class of damages involving actual negligence or carelessness

specified by this Court in *Barrett* v. *Van Pelt, supra;* or, to limit the time for giving notices or claims in other classes of damages to less than ninety days for notices of claim nor four months for the filing of claims. Therefore, sec. 4, par. e (Tr. 89), of the uniform livestock contract under consideration is invalid.

We have found a number of cases in which these two apparently conflicting contractual provisions are considered supporting the foregoing statement and we cite these cases for your consideration; *Wichita Valley Ry. Co.* v. *Baldwin*, — Tex. Civ. A. —, 270 S. W. 1089; *Erie Ry. Co.* v. *Callahan Co.*, — Ind. —, 184 N. E. 264; *Forkner* v. *Louisville & N. R. Co.*, 232 Ky. 579, 24 S. W. (2d) 290; *Hicklin* v. *Central of Ga. Ry. Co.*, 40 Ga. A. 297, 149 S. E. 286; *Hill* v. *Great Northern Ry. Co.*, 156 Wash. 567, 287 Pac. 665; *Evans* v. *A. T. & S. F. Ry. Co.*, — N. M. —, 20 Pac. (2d) 932; and *Louis Ilfeld Co.* v. *Southern Pacific Co.*, (C. C. A. 10th Cir.), 48 Fed. (2d) 1056. We desire to quote a portion of the opinion in this last case, which is the rule we seek to have applied herein:

> "The parties differ in construing the words 'notice of claim,' in the statute. Appellants contend that, where negligence is the ground of suit, the language of the amendment was broad enough to render invalid the stipulation for written notice of injury. Appellee insists that such notice was not meant to be excluded, and, the stipulation being valid, the failure to comply with it defeated a recovery.

"It must be conceded there is support for appellee's contention. The 'Uniform Livestock Contract' appears to have been prescribed by the Interstate Commerce Commission, and reflects its construction of the Amendment. 64 I. C. C. 357, October 21, 1921; 52 I. C. C. 671, April 14, 1919; 33 I. C. C. 682, May 7, 1915. And doubtless the Commission acted within the powers confided to it by Congress. *Missouri Pac. R. Co.* v. *Porter*, 273 U. S. 341, 47 S. Ct. 383, 71 L. Ed. 672. Great weight would have attached to a contemporaneous construction of the proviso if it is ambiguous in meaning. *Swift & Co.* v. *United States*, 105 U. S. 691, 26 L. Ed. 1108; *Allen, Collector* v. *Morsman, Trustee*, 46 F. (2d) 891 (8 C. C. A. Feb. 17, 1931); *National Lead Co.* v. *United States*, 252 U. S. 140, 40 S. Ct. 237, 64 L. Ed. 496. But it was long delayed and we are not convinced the meaning is in doubt.

"Counsel for appellee rely upon decisions holding that a protest against or notice of damage is not a notice of claim required by a bill of lading. *Anchor Line, Ltd.* v. *Jackson*, (C. C. A.) 9 F. (2d) 543; *Duche & Sons* v. *Mediterraneo*, (D. C.) 31 F. (2d) 496. In addition, several decisions in the state courts are cited which sustain defenses based on stipulations which required notice of injury. But none of these cases construed the Cummins Amendment.

"We are impressed that appellee depends on a construction of the proviso which is too narrow and technical to reach its full meaning. In *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, construing the Carmack Amendment to the Hepburn Act (49 U. S. C. A. sec. 20), which fixed liability for damages on initial carriers, it was held that theretofore liability was determined by the general common law as declared by the

Supreme Court and enforced in the federal courts, and by state policies and statutes, and that no uniformity of obligation or liability was possible until Congress dealt with the subject. There were other constructions of that amendment, which were reviewed in *Pierce Co. v. Wells, Fargo & Co.*, (Feb. 23, 1915) 236 U. S. 278, 35 S. Ct. 351, 59 L. Ed. 576.

"The Cummins Amendment was soon adopted with uniformity in view respecting liability upon contracts for interstate shipments, and declared unnecessary notice or filing of claims in negligence cases. We think the language used is not ambiguous, when considered in the light of this manifest purpose. It was doubtless intended to be complete, as a regulation of all matters pertaining to claims based on negligence. No room appears to have been left for a stipulation requiring written notice of injury, upon the theory of a distinction between that phrase and notice of a claim. The letter of the law would thus be made the basis of construction rather than its object. A notice of injury would serve no other purpose than to apprise the carrier of a claim for damages. It is obvious that, if a carrier is not entitled to notice of a claim, it is not entitled to notice of an injury, which has a claim as its object. As the reason for both is the same, they are therefore practically synonymous in meaning. And as was said in *Barrett* v. *Van Pelt*, 268 U. S. 85, 45 S. Ct. 437, 69 L. Ed. 857, it may reasonably be thought that, where the ground of suit is negligence, the carrier has knowledge of the facts or expects a claim to be made for compensation. In our opinion, the proviso in question was intended to prohibit a notice of injury as a defense."

It might be said at this point that the Supreme Court of the State of Oklahoma has consistently applied the rule

announced in the above cases and although its decision thereon is being attacked by this review, we nevertheless call the Court's attention to the case of *Deming* v. *M.-K.-T. Ry. Co.*, 138 Okla. 276, 281 Pac. 240.

The trial court instructed the jury that the giving of notice to the carrier of visible or manifest injuries to the cattle was necessary, which in our judgment was erroneous, prejudicial to us and too favorable to petitioner, and further instructed the jury that under certain circumstances such notice might be waived (Tr. 147-8). The petitioner contends that the instruction to the jury that such notice might be waived is error, which justifies or necessitates the reversal of the judgment. We call attention to the case of *Southern Pac. Co.* v. *Di Cristina*, 36 Ga. A. 433, 137 S. E. 79, involving the question under consideration in this review, wherein the court instructed the jury upon an extraneous and probably erroneous phase of the case, and the Georgia court disposed of the matter with the following statement:

> "Other grounds of the motion for a new trial assign error upon certain excerpts from the charge of the court, one of which was an instruction to the effect that if the shipment was handled by a railroad not specified in the routing, then the defendant railroad company would not have the right to rely upon the provisions of the bill of lading as to the filing of the claim within six months, the exception thereto being that a mere misrouting would not amount to an aband-

onment of the bill of lading or to a waiver of its terms. This point seems to have been theoretically well taken, in view of *Georgia, F. & A. R. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 36 S. Ct. 541, 60 L. Ed. 948; *Barrett* v. *Van Pelt*, 268 U. S. 85, 45 S. Ct. 437, 69 L. Ed. 857; *Davis* v. *Roper, Co.*, 269 U. S. 158, 46 S. Ct. 28, 70 L. Ed. 209, 44 A. L. R. 1357. If error was committed as alleged, however, we think it was immaterial in the present case, in the view which we take of the evidence upon the subject of negligence.

"Under the Act of March 4, 1915, amending the Interstate Commerce Act of February 4, 1887, as amended by section 7 of the Act of June 29, 1906 (U. S. Comp. St., sec. 8604a), it is unnecessary that the plaintiff shall file a claim within the time named in the bill of lading, if the loss or damage complained of was due to delay or damage while being loaded or unloaded, or damage in transit by carelessness or negligence. It would seem that an error such as here alleged would be harmless in any case which was actually submitted and tried on the theory of the defendant's negligence and in which the jury were required by the court to return a verdict in favor of the carrier if they found it was not negligent."

We say that a proper construction of the Act of March 4, 1915, supra, as embodied in the uniform livestock contract involved herein, will be that authority for requiring the notice provided for by sec. 4, par. c (Tr. 89), is not only lacking, but that such a condition in a shipping contract is invalid, and that it was not only unnecessary to give such notice under the facts in our case, but that the giving of such instruction relative to notice is harmless error, be-

cause it was in favor of the petitioner. Whatever erroneous limitations or qualifications the trial court may have placed upon the right of the petitioner to defend upon a failure to give such notice to it, they are not prejudicial to the petitioner because it was not entitled to such notice under the law upon the facts proved by us.

In addition to the cases cited above construing the Act of March 4, 1915, supra, we desire to call attention to *Hailey* v. *Oregon Short Line Ry. Co.*, 253 Fed. 569, *Radousky* v. *N. Y., N. H. & H. Ry. Co.*, 258 Mass. 26, 154 N. E. 334; *Hunt* v. *Hines, Director General*, 204 Mo. A. 318, 223 S. W. 789; and, *Am. Ry. Express Co.* v. *Rouw*, 173 Ark. 810, 294 S. W. 401.

CONCLUSION.

We respectfully urge in conclusion that this Honorable Court give the uniform livestock contract involved herein and the rights and obligations of the parties thereto a construction which will be in keeping with the intention of the Congress of the United States, as expressed in the Act of March 4, 1915, and as interpreted by the courts of last resort of many states and the Circuit Court of Appeals of the 10th Circuit. We submit that the proper construction of such Act is as important to the shippers of the country, and especially livestock shippers, who oftentimes must re-

ceive and take charge of their cattle under conditions which render the giving of such written notice before they are received or commingled with other cattle impracticable, if not impossible, as it is to the carriers of the country. It is equally important to both.

Respectfully submitted,

O. C. Stevens,

Tulsa, Oklahoma,

Counsel for Respondents.